(3)

No. 03-953

In the

Supreme Court of the United States

USX CORPORATION & BESSEMER AND LAKE ERIE RAILROAD COMPANY,

Petitioners,

v.

ADRIATIC INSURANCE COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR LONDON MARKET RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Bernard D. Marcus
Robert L. Allman, II
MARCUS & SHAPIRA LLP
One Oxford Centre
35th Floor
301 Grant Street
Pittsburgh, PA 15219-6401
(412) 471-3490

Martin R. Baach
Counsel of Record
James P. Davenport
Geovette E. Washington
BAACH ROBINSON & LEWIS PLLC
1201 F Street, NW
Suite 500
Washington, DC 20004
(202) 833-8900

Attorneys for Respondents, Certain Underwriters at Lloyd's, London and Certain Companies in the London Insurance Market (including Icarom plc (under administration))(collectively, the "London Market Respondents")

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. R. 29.6

Pursuant to Sup. Ct. R. 29.6, Respondents, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (including Icarom plc (under administration)) (collectively, the "London Market Respondents") make the following disclosure:

1. **The parent corporations of the non-governmental London Market Respondents are as follows:**

The Baloise Insurance Company Limited is wholly owned by Baloise Holding Company (Switzerland).

CNA Reinsurance of London Limited, now known as CNA Reinsurance Company Limited, is a wholly owned subsidiary of CNA Re Management Company Limited, a down-stream holding company of Continental Casualty Company. The latter, in turn, is controlled by CNA Financial Corporation, the parent and holding company of CNA Insurance Group. The ultimate holding company is Loews Corporation, which owns 86% of the capital stock of CNA Financial Corporation.

Commercial Union Assurance Company PLC has as its ultimate parent CGU PLC.

The Dominion Insurance Company Limited is a wholly owned subsidiary of B.D. Cooke Investments Limited.

Excess Insurance Company Limited is a wholly owned subsidiary of London & Edinburgh Insurance Group Limited (UK), which is itself a wholly owned subsidiary of Hartford International Insurance Company (USA). The ultimate holding company is ITT Corporation (USA).

London & Edinburgh General Insurance Company Limited, now known as London & Edinburgh Insurance Company Limited, is a wholly owned subsidiary of London & Edinburgh Insurance Group Limited (UK), which is itself a wholly owned subsidiary of Hartford International Insurance Company (USA). The ultimate holding company is ITT Corporation (USA).

Sphere Drake Insurance Company Limited is the same as Sphere Drake Insurance PLC. The ultimate UK holding company is Odyssey Re Holding (UK) Limited (formerly Sphere Drake Limited). The ultimate parent company is Fairfax Financial Holdings Ltd. (Canada).

St. Katherine Insurance Company PLC, now known as St. Paul International Insurance Company, is a wholly owned subsidiary of St. Paul (UK) Limited, a holding company incorporated in the United Kingdom. The ultimate holding company is the St. Paul Companies Inc. (USA).

St. Paul Fire & Marine Insurance Company (UK) Limited has as its ultimate holding company the St. Paul Companies Inc. (USA).

Taisho Marine & Fire Insurance Co. (Europe) Limited, now named Mitsui Marine and Fire Insurance Company (Europe) Limited, has as its ultimate holding company Mitsui Marine and Fire Insurance Company Limited (Japan).

Tokio Marine and Fire Insurance Company (UK) Limited, is a wholly owned subsidiary of Tokio Marine & Fire Insurance Company Limited (Japan).

Turegum Insurance Company Limited is the wholly owned subsidiary of Zurich Insurance Company (also known as Zurich Versicherungs-Gesellschaft).

UnionAmerica Insurance Company Limited is a wholly owned subsidiary of UnionAmerica Acquisition Company Limited, which in turn is a wholly owned subsidiary of UnionAmerica Holdings PLC, which is itself a wholly owned subsidiary of MMI Companies, Inc., which was acquired by St. Paul Companies USA St. Paul Companies USA is the ultimate holding company for UnionAmerica Insurance Company.

2. The following publicly-held companies hold 10% or more of a London Market Respondent's stock:

Baloise Holding Company (Switzerland) wholly owns Appellee The Baloise Insurance Company Limited.

CNA Management Company Limited wholly owns Appellee CNA Reinsurance of London Limited,

now known as CNA Reinsurance Company Limited. CNA Re Management Company Limited is a downstream holding company of Continental Casualty Company. The latter, in turn, is controlled by CNA Financial Corporation, the parent and holding company of CNA Insurance Group. The ultimate holding company is Loews Corporation, which owns 86% of the capital stock of CNA Financial Corporation.

CGU PLC is the ultimate parent of Appellee Commercial Union Assurance Company PLC.

London & Edinburgh Insurance Group Limited (UK) wholly owns Appellee Excess Insurance Company Limited. Hartford International Insurance Company (USA) wholly owns London & Edinburgh Insurance Group Limited (UK). ITT Corporation (USA) is the ultimate holding company.

London & Edinburgh Insurance Group Limited (UK) wholly owns Appellee London & Edinburgh General Insurance Company Limited, now known as London & Edinburgh Insurance Company Limited. Hartford International Insurance Company (USA) wholly owns London & Edinburgh Insurance Group Limited (UK). ITT Corporation (USA) is the ultimate holding company.

Odyssey Re Holding (UK) Limited (formerly Sphere Drake Limited) is the ultimate UK holding company of Appellee Sphere Drake Insurance Company Limited, which is the same as Sphere Drake Insurance PLC. Fairfax Financial Holdings Ltd. (Canada) is the ultimate parent of Odyssey Re Holding (UK) Limited.

St. Paul (UK) Limited wholly owns Appellee St. Katherine Insurance Company PLC, now known as St. Paul International Insurance Company. St. Paul Companies, Inc. (USA) is the ultimate holding company of St. Paul (UK) Limited.

The St. Paul Companies Inc. (USA) is the ultimate holding company of Appellee St. Paul Fire & Marine Insurance Company (UK) Limited.

Mitsui Marine and Fire Insurance Co. Limited (Japan) is the ultimate holding company of Appellee Taisho Marine & Fire Insurance Co. (Europe) Limited.

Tokio Marine & Fire Insurance Company Limited (Japan) wholly owns Appellee Tokio Marine and Fire Insurance Company (UK) Limited.

UnionAmerica Acquisition Company Limited is the parent of Appellee UnionAmerica Insurance Company Limited. UnionAmerica Holdings PLC wholly owns UnionAmerica Acquisition Company Limited. MMI Companies, Inc. wholly owns UnionAmerica Holdings PLC. St. Paul Companies USA acquired MMI Companies, Inc., and is the ultimate holding company for UnionAmerica Insurance Company.

Zurich Insurance Company (also known as Zurich Versicherungs-Gesellschaft) wholly owns Appellee Turegum Insurance Company Limited.

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BRIEF OF THE LONDON MARKET RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (including Icarom plc (under administration)) (collectively the "London Market Respondents") oppose the petition for writ of certiorari.

After eight years of litigation, the Third Circuit rejected USX's contention that its insurers should indemnify USX for its criminal misconduct in perpetrating one of the most massive antitrust conspiracies in history. The circuit court dismissed this claim with these few words:

> We think it plain that USX could not reasonably have expected when it obtained its insurance policies or at any later time to have the coverage it sought in this case for the consequences of its wrongful activities. While we are aware that USX obtained and paid for broad coverage it should have recognized that there was some limit to it and we regard its substantive contentions, though complex, as not meritorious.

USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 216 (3rd Cir. 2003), Appendix to Petitioners Writ for Certiorari (hereinafter referred to as "App.") at 53.

USX now comes to this Court with the contention that it should be permitted to start all over

in state court because the Third Circuit ignored some principle of the Foreign Sovereign Immunities Act ("FSIA") when it exercised jurisdiction over this case. In fact, the circuit court resolved the FSIA jurisdictional issue entirely properly, and USX's petition raises no issue remotely deserving consideration through writ of certiorari.

USX contends that certiorari is proper for two reasons, both of which are without basis. First, USX argues that the Third Circuit's decision "conflicts with and contravenes" this Court's decision in *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003), on the issue of the appropriate timeframe for measuring jurisdictional facts under the FSIA. Petitioners Writ for Certiorari (hereinafter referred to as "Petition") at 10. This remarkable contention ignores the fact that the Third Circuit waited for this Court to rule in *Dole Food* before deciding the instant case and then expressly acknowledged and followed this Court's directive in *Dole Food*. *See* App. 36 n.16.

Second, USX contends that the Third Circuit's decision also "conflicts with and contravenes" this Court's decision in *Dole Food* with respect to the factors to be considered in determining instrumentality status under the "organ" prong of the FSIA. Petition at 10. Yet *Dole Food* does not even consider, much less determine, the appropriate factors for organ status, and the Third Circuit's approach to this issue is in no sense at odds with *Dole Food* and is squarely in line with unanimous circuit court precedent.

The petition should be denied.

STATEMENT OF THE CASE

The London Market Respondents do not agree with the Statement of the Case presented in petitioners' brief but do agree with the Statement contained in the Brief of Certain Domestic Insurer Respondents in Opposition to the Petition for Writ of Certiorari. Accordingly, they adopt and incorporate Certain Domestic Insurer Respondents' Statement of the Case by reference.

REASONS FOR DENYING THE PETITION

I. In Strict Compliance With The Timeframe Adopted In *Dole Food*, The Third Circuit Determined Icarom's Status As An Organ Of The Irish Republic As Of The Date Of Removal And Not As Of Some Earlier Date.

USX's first reason for requesting a writ of certiorari is its assertion that the Third Circuit directly contravened this Court's holding in *Dole Food* by improperly basing its determination of Icarom's status as an FSIA organ on the facts as they existed ten years prior to the filing of the lawsuit instead of the facts as they existed when the lawsuit was filed and removed to federal court. The Third Circuit did no such thing. First, recognizing that this Court's guidance was imminent, it waited for the Court to decide *Dole Food* before considering the instant case.[1] Then, following this Court's lead in *Dole Food*, the Third Circuit

[1] The parties jointly moved to stay the appeal below on grounds that *Dole Food* was pending decision in this Court, and by order of April 21, 2003, the Third Circuit granted this motion.

expressly recognized that an entity could be an organ of a foreign state at one time but not at another. Citing the very holding in *Dole Food* that USX here contends was violated, the Third Circuit ruled:

> But we are holding that Icarom was an organ when USX sued it and it removed the case and its status at that time is what matters. *See Dole*, 123 S. Ct. at 1662.

App. 36 n.16. This unambiguous declaration thoroughly refutes USX's contention that the Third Circuit rejected *Dole Food*'s holding as to the relevant timeframe for determining jurisdictional facts.

At most, USX's argument for certiorari is that the Third Circuit adopted the proper rule of law on the jurisdictional timeframe but nonetheless misapplied the rule to the facts. Of course, USX avoids this formulation because it recognizes that under this Court's rules certiorari "is rarely granted" on this ground. *See* Sup. Ct. R. 10. In all events, a misapplication of law argument is untenable here. Not only did the Third Circuit accept the timing standard called for by *Dole Food*, it correctly applied that standard. To be sure, the circuit court first reviewed the circumstances that led the Irish government to acquire The Insurance Corporation of Ireland plc ("ICI") (now known as Icarom plc (under administration)) in 1985, but it did so in order to explore the government's purpose in making that acquisition. That purpose was not to take on a commercial, profit-making venture but to protect the government's vital national interests in shielding the Irish insurance and banking industries from financial disaster. By the

government becoming ICI's sole beneficial owner and its lender of last resort, the acquisition served that purpose from the outset, and the ultimate orderly windup of Icarom continues to serve that purpose today. As the Third Circuit recognized, while Icarom's status as an organ of the Irish government must be determined as of the date when this action was removed to the district court, it can only be understood in its historical context. That context begins with the original acquisition of ICI, continues with the government's ongoing financial support and supervision of that company and its subsequent spin-off of ICI's Irish market business, and will culminate in the orderly operation and windup of what remains as a runoff entity. As the Third Circuit noted:

> Thus, although Icarom is operating as a runoff company, it does so only because the government positioned it to do so and only under the supervision of the government, as the district court found. *See* Juris. J.A. at 42, 44. Moreover, in doing this it is carrying out the undertaking of the government when it intervened in the first instance so that a public financial crisis would be avoided.

App. 42-43.

In this Court, USX argues that the Irish government's interest in Icarom has long since "evaporated" and that Icarom "effectively had severed its relationship" with the government prior to this lawsuit. Petition at 13. But this argument simply quarrels with the findings of fact below. It does not

concern the adoption of a wrong legal rule or the misapplication of the rule to the facts. The district court and the Third Circuit rejected USX's view of the facts, and the well-developed record fully supports their decisions. Unlike the circumstances in *Dole Food*, where by the time of suit the Israeli government had completely severed its relationship with entities in which it earlier had an indirect partial ownership interest, the Irish government's 100% beneficial interest in Icarom, its critical financial support and close supervision of this entity, and its ultimate purpose to wind up its affairs in an orderly manner so as to protect the Irish economy are as strong today as they were when the government first intervened in the crisis in 1985.

The Third Circuit thus decided jurisdiction based on the facts existing when the action was removed to the district court in full compliance with *Dole Food*, and this case presents no certiorari-worthy issue on this ground.

II. The Third Circuit's Consideration Of The Irish Government's Beneficial Ownership Of Icarom As Evidence Of Its Control Over This Organ Is Fully Consistent With *Dole Food* And Other Circuit Precedent.

USX next contends that the Third Circuit improperly considered the Irish government's 100% beneficial ownership of Icarom as one of several factors supporting its qualification as an FSIA organ, arguing that *Dole Food* precluded any consideration of indirect ownership as a basis for jurisdiction. Yet *Dole Food* dealt solely with the ownership prong of the statute.

The organ prong was not in issue in *Dole Food*, and this Court did not address what factors support a determination whether an entity is an organ of a foreign state. *Dole Food* simply held that indirect ownership – where the foreign government owns shares in a parent company, which, in turn, owns shares in its subsidiary – does not qualify the subsidiary as a majority owned entity under the FSIA. This Court ruled that the unambiguous language of the ownership prong of that statute requires that the entity seeking FSIA protection have a majority of *its* shares owned by the government and not simply a majority of its *parent's* shares. 123 S. Ct. at 1662.

As this Court made clear in *Dole Food*, indirect ownership may well have an important bearing on the foreign government's *control* over the entity seeking FSIA protection, but the ownership prong of the statute does not turn on control but on formal corporate structure. *Id.* at 1661-62. This decision is hardly at odds with the conclusion reached by every circuit court to address the issue, namely, that *control* is at the very heart of the organ prong of the statute. *See EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd on other grounds*, 123 S. Ct. 1655 (2003); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 848 (5th Cir. 2000); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995).

The FSIA itself does not define the term "organ." Both the circuit and district court cases that

have considered the issue uniformly interpret the term to refer to an entity through which the government carries out some vital national policy. *See EIE Guam*, 322 F.3d at 640 ("The Japanese government created the [defendant corporation] expressly to perform a public function . . . to carry out Japanese national policy related to revitalization of the Japanese financial system"); *Kelly*, 213 F.3d at 848 (defendant petroleum company "was created by a Syrian government decree for a national purpose: the development and exploration of Syria's mineral resources"); *Corporacion Mexicana*, 89 F.3d at 655 (defendant refining company was "charged with the exclusive responsibility of refining and distributing Mexican government property"); *Gates*, 54 F.3d at 1461 (purpose of defendant pork producers marketing board was to "advance the Province of Alberta's interest in marketing Alberta hogs"); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003) (defendant Korean Deposit Insurance Corporation performed "a function traditionally performed by governments: 'to contribute to protecting depositors and maintaining the stability of the financial system'"); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124, 1999 U.S. Dist. LEXIS 7236, at *26 (S.D.N.Y. May 17, 1999) (defendant petroleum company was created for a national purpose, "to advance the Brazilian Government's monopoly over the national oil industry"); *Glencore, Ltd. v. Chase Manhattan Bank, N.A.*, No. 92 Civ. 6214, 1998 U.S. Dist. LEXIS 1912, at *9 (S.D.N.Y. Feb. 20, 1998) (defendant bank was organized pursuant to statute with "national purpose" of "expand[ing] Government supported banking throughout India"); *Southern Ocean Seafood Co. v. Holt Cargo Sys., Inc.*, No. 96-5217, 1997 U.S. Dist. LEXIS 12159, at *14 (E.D. Pa. Aug. 12, 1997)

(defendant fisheries commission was created "for the national purpose of complying with treaty obligations between New Zealand and indigenous peoples"); *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993) (defendant university was "formed by the Australian government to further academic interests of national importance"); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981) (defendant labor organization was "charged with responsibility for arranging and monitoring the employment of British West Indian workers in the United States"). *Compare Patrickson*, 251 F.3d at 808 (defendant chemical companies acted "to maximize profits rather than pursue public objectives"); *United States Fidelity*, 1999 U.S.Dist. LEXIS 7236, at *18 (another defendant petroleum company was not created pursuant to national interest of acting "in furtherance of Brazil's oil monopoly"); *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 654-59 (W.D. Tenn. 1998) (defendant bank and purchasing agent companies performed no government function); *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997) (no evidence that defendant medical schools "serve any peculiar national or governmental purpose in Great Britain"). The foreign government's control over its entity is the essence of organ status, and *Dole Food* does not suggest otherwise.

USX criticizes the Third Circuit for adding the ownership structure of the entity in question to the list of factors that the Ninth Circuit has articulated. Petition at 9. But contrary to USX's submission, there is a "counterpart" in Ninth Circuit jurisprudence to the Third Circuit's ownership factor. Ownership structure is simply evidentiary of the degree of foreign

government's supervision of the entity, a factor that all courts have recognized as pertinent to organ status.[2] And in any event, the Third Circuit's consideration of the ownership structure was not dispositive. As the Third Circuit put it:

> Even if we did not add "ownership structure" as a seventh factor to consider in the organ analysis the allegation likely would be relevant to the third factor, namely, the degree of supervision by the government.

App. 38 n.18. Plainly, the fact that the Irish government owns the entire beneficial interest of Icarom, acting through a holding company created by special legislation of the Irish Parliament and held by Ministers of the Irish government for the sole purpose holding Icarom's stock, is powerful evidence of the government's control over and vital interest in this entity.

USX seeks to identify a conflict with this Court's jurisprudence by arguing that the decision below is an end run around the limited definition of ownership adopted in *Dole Food*. But this argument ignores the fact that Congress itself provided alternative, independent grounds for instrumentality status: organ and ownership. Circumstances like beneficial

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[2] Remarkably, USX fails to include this factor in its listing of the Ninth Circuit's organ criteria. Petition at 9. Nonetheless, USX endorsed the Ninth Circuit's test in its totality in the courts below and, therefore, presumably is not here suggesting that the degree of the government's supervision should not be considered in determining whether an entity is an FSIA organ.

ownership and close control of an entity that do not qualify under the ownership prong may well support qualification under the organ prong. Contrary to USX's hyperbole, this hardly makes it "difficult to conceive" that any indirectly owned entity will not qualify as an organ. *See* Petition at 20. A foreign government may well have an indirect ownership interest in an entity that serves no particular national purpose. The Dead Sea companies arguably were precisely such entities, and this Court may well have so ruled had that issue been presented in *Dole Food*. In sharp contrast, Icarom qualifies as an organ of the Irish state because the government's control over that entity, in part through its 100% indirect ownership, allowed it to use Icarom as an instrument for the protection of the Irish economy.

Far from being at odds with other circuit court precedent on this issue, as USX implies, the Third Circuit is squarely in line with decisions of the Ninth Circuit. In *Corporacion Mexicana*, 89 F.3d at 650, for example, the Ninth Circuit listed the district court's finding that the entity was entirely owned by the government as the first factor favoring its status as an organ. And in *EOTT Energy Operating Ltd. Pshp. v. Winterthur Swiss Ins. Co.*, 257 F.3d 992 (9th Cir. 2001), the Ninth Circuit listed the indirect ownership of Icarom by the government, acting through a holding company whose shares are held in trust for the Irish Minister, as evidence supporting its organ status. USX's omission of any mention of the Ninth Circuit's decision in *EOTT Energy* is conspicuous given that that case dealt with the exact same foreign governmental entity at issue here and predicted that Icarom would be deemed an organ if the facts turned out as had been

represented by counsel in that appeal. The Third Circuit so ruled in the instant case based on a fully developed record.

In sum, there is no split of any kind among the lower courts on the factors that bear on organ status or on how Icarom stacks up under those factors. There is certainly no divergence by the courts below from any views expressed by this Court on the issue. There is thus nothing whatever to commend this case for review on certiorari.

CONCLUSION

For the reasons set forth above, the London Market Respondents respectfully request that USX's petition for writ of certiorari be denied.

Respectfully submitted,

Martin R. Baach
Counsel of Record
James P. Davenport
Geovette E. Washington
BAACH ROBINSON &
LEWIS PLLC
1201 F Street, NW
Suite 500
Washington, DC 20004
202/833-8900

Bernard D. Marcus
Robert L. Allman, II
MARCUS & SHAPIRA LLP
One Oxford Centre, 35th Floor
301 Grant Street
Pittsburgh, PA 15219-6401
412/471-3490

Attorneys for Respondents, Certain Underwriters at Lloyd's, London and Certain Companies in the London Insurance Market (including Icarom plc (under administration))

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